Helu-Zaid Sdn Bhd v Sin Heap Lee Brickworks Sdn Bhd

HIGH COURT (KUALA LUMPUR) — SUIT NO S2-22-550-1992
KAMALANATHAN RATNAM J
7 OCTOBER 1998

Contract *— Breach — Claim for services rendered — Plaintiff forwarding agent for defendant — Whether there was delay in shipment of goods — Whether there was breach of contract by using 'non-conference line' vessel*

Civil Procedure *— Documents — Agreed bundle — Effect of not raising objection at case management stage on inclusion of document into agreed bundle*

The plaintiff was engaged by the defendant to be the forwarding agent for a set of machinery for bulk manufacture of bricks that the defendant purchased from an Italian company on a turnkey basis. The main terms of the engagement were that the plaintiff was to be responsible for the transport of the machinery from Genoa, Italy to Port Kelang and thereafter to the defendant's site at Sepang. The choice of vessel was to be by way of 'conference line' and the plaintiff was to attend to all necessary custom clearance. By way of a facsimile dated 10 May 1991 ('the fax'), the plaintiff wrote to the defendant to confirm that due to the inability to obtain conference line shipping, the plaintiff would proceed instead to ship the machinery by way of non-conference line. Four consignments arrived at Port Kelang between July and August 1991, and after taking into account various credit notes paid by the defendant, there was a sum of RM208,530.40 accruing to the plaintiff. The plaintiff claimed for this sum and interest on the same at 1.5% per month. The defendant denied the claim and counterclaimed for various losses including breach of contract by using 'non-conference line', delay in delivering the machinery, negligently affixing the wrong custom code on the machinery resulting in extra expenses and delay, loss of profits arising from delay in utilization of the machinery, extra interest charges on the banking facilities and various other losses. In relation to the fax, notwithstanding the fact that it was included in the common agreed bundle of documents and no objection was raised during case management on 15 January 1998, the defendant at trial sought to deny knowledge of the said documents.

Held, allowing the plaintiff's claim and dismissing the counterclaim:

(1) Once a document was included in an agreed bundle of documents without qualification, no question as to its formal proof arises and its contents may be relied on to establish a fact in issue. In the light of the fact that no objection was raised to any document during case management on 15 January 1998, it was inappropriate for the defendant to now deny knowledge of the fax. It was clear that in order not to delay despatching the machinery, the plaintiff

with the consent of the defendant forwarded the same on a non-conference line vessel (see p 740F–G); *Jaafar Shaari & Anor v Tan Lip Eng & Anor* [1997] 3 MLJ 693 followed.

(2) As the plaintiff's claim was supported by documents, it was allowed. The plaintiff was also entitled to charge interest at 1.5% per month in accordance with cl 4 of the Standard Trading Conditions of the Institute of Freight Forwarders Trading Conditions and the General Terms and Conditions (see p 741E–F).

(3) The defendant had failed to prove that there was any wanton or unreasonable delay by the plaintiff in the shipping of the said machinery. As none of the items claimed in the counterclaim had been proven satisfactorily, the counterclaim must be dismissed with costs (see pp 739H–I and 741H–I).

[Bahasa Malaysia summary

Plaintif telah diambil oleh defendan untuk menjadi ejen penghantar bagi satu set jentera untuk pengilangan pukal batu bata yang telah dibeli oleh defendan daripada sebuah syarikat Itali atas dasar serah kunci (turnkey). Terma-terma utama perlantikan tersebut adalah bahawa plaintif haruslah bertanggungjawab bagi pengangkutan jentera tersebut dari Genoa, Itali ke Pelabuhan Kelang dan kemudiannya ke tapak kerja defendan di Sepang. Pilihan kapal hendaklah melalui 'conference line' dan plaintif haruslah melaksanakan segala kelulusan kastam yang perlu. Melalui faksimili bertarikh 10 Mei 1991 ('faks tersebut'), plaintif telah menulis kepada defendan bagi mengesahkan bahawa disebabkan ketidakupayaan untuk mendapatkan khidmat perkapalan 'conference line' plaintif sebaliknya akan terus mengangkut jentera tersebut melalui 'non-conference line'. Empat konsainan telah sampai di Pelabuhan Kelang antara bulan Julai dan Ogos 1991, dan setelah mengambil kira pelbagai nota kredit yang dibayar oleh defendan, terdapat satu jumlah sebanyak RM203,530.40 yang terakru kepada plaintif. Plaintif telah membuat tuntutan untuk jumlah ini dan faedah ke atasnya pada kadar 1.5% sebulan. Defendan telah menafikan tuntutan tersebut dan telah membuat tuntutan balas bagi pelbagai kerugian termasuk kemungkiran kontrak dengan menggunakan 'non-conference line', kelewatan menghantar-serahkan jentera tersebut, dengan cuainya telah menampalkan kos kastam yang salah kepada jentera tersebut yang mengakibatkan perbelanjaan yang berlebihan dan kelewatan, kehilangan keuntungan yang berbangkit dari kelewatan dalam penggunaan jentera tersebut, lebihan bayaran faedah ke atas kemudahan-kemudahan perbankan dan pelbagai kerugian-kerugian yang lain. Sehubungan dengan faks tersebut, meskipun terdapat fakta bahawa ia telah disertakan dalam ikatan dokumen biasa yang telah dipersetujui dan tiada bantahan telah dibangkitkan ketika pengurusan kes pada 15 Januari 1998, defendan cuba untuk menafikan sebarang pengetahuan mengenai dokumen tersebut di perbicaraan.

A **Diputuskan**, membenarkan tuntutan plaintif dan menolak tuntutan balas tersebut:

(1) Sebaik sahaja sesuatu dokumen telah dimasukkan ke dalam ikatan dokumen-dokumen yang dipersetujui tanpa syarat, tiada persoalan mengenai bukti rasminya berbangkit dan kandungannya boleh
B dipercayai untuk menentukan satu fakta yang menjadi isu. Memandangkan hakikat bahawa tiada bantahan telah dibangkitkan terhadap sebarang dokumen ketika pengurusan kes pada 15 Januari 1998, ia adalah tidak wajar bagi defendan untuk kini menafikan pengetahuan mengenai faks tersebut. Ia jelas bahawa untuk tidak melewatkan penghantar jentera tersebut,
C plaintif dengan persetujuan defendan telah mengangkutnya atas kapal 'non-conference line' (lihat ms 740F–G); *Jaafar Shaari & Anor v Tan Lip Eng & Anor* [1997] 3 MLJ 693 diikut.

(2) Oleh kerana tuntutan plaintif disokong oleh dokumen-dokumen, ia telah dibenarkan. Plaintif adalah juga berhak untuk mengenakan
D faedah pada kadar 1.5% sebulan menurut fasal 4 'Standard Trading Conditions of the Institute of Freight Forwarders Trading Conditions and the General Terms and Conditions' (lihat ms 741E–F).

(3) Defendan telah gagal untuk membuktikan bahawa terdapatnya
E sebarang kelewatan yang tidak wajar atau yang sewenang-wenangnya oleh plaintif dalam pengangkutan jentera tersebut. Oleh kerana tidak satu pun dari perkara-perkara yang dituntut dalam tuntutan balas tersebut telah terbukti dengan cara yang memuaskan, tuntutan balas tersebut haruslah ditolak dengan kos (lihat ms 739H–I dan 741H–I).]

F

Notes

For cases on agreed bundle of documents, see 2(1) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 1640–1645.

For cases on breach of contract generally, see 3 *Mallal's Digest*
G (4th Ed, 1997 Reissue) paras 1611–1693.

Case referred to

Jaafar Shaari & Anor v Tan Lip Eng & Anor [1997] 3 MLJ 693
H (folld)

Lachaman Lalchand (*M Ravichandar* with him) (*Lachaman Lalchand & Associates*) for the plaintiff.

B Jayanthi (*Chia Ooi Sun & Co*) for the defendant.

I

Cur Adv Vult

Kamalanathan Ratnam J:

Facts

The defendant, a brick manufacturing company, purchased from an Italian company, Morando Impianti (Morando), a set of machinery for the bulk manufacture of bricks on a turnkey basis.

The defendant then entered into an agreement with the plaintiff as forwarding agent. The terms of the agreement were contained in a letter which was an agreed and admitted document found at pp 1 and 2 of 1CABD (common agreed bundle of documents).

Subsequently on the same day the parties had agreed, by way of another letter, to the same terms and conditions as found in pp 1 and 2 of 1CABD except that the term:

> To reflect the changes in current freight, transport costs, currency rates or any charges expended on your behalf, all quotations given are subject to revision without prior notice. Prices do not include custom duties, taxes, levies, deposits or other payments of a disbursement nature.

was deleted. Further, a new term:

> Choice of vessel: Conference line

was included.

These endorsements were reflected in a fresh letter included in pp 1 and 2 of 2CABD.

Case for the plaintiff

The plaintiff's claim is for the sum of RM208,530.40 as at 1 December 1991 and interest at the rate of 1.5% per month on the said sum from 1 December 1991 till full payment.

Case for the defendant

The defendant denies owing the said sum and contends that whilst it was an express term of the agreement that the mode of vessel to be used for the freight forwarding was by 'conference line', the plaintiff had breached the said agreement by using a 'non-conference line'. Further, the defendant contended that by using the non-conference line the plaintiff ought to have reduced the charges. The defendant argued that the plaintiff had caused delay in providing the open top containers to Morando, the supplier of the machinery in Italy. The defendant was thus forced to pay extra storage charges amounting to US$40,000 to the plaintiff's agent in Italy, Zurt Ambrosetti, for the said additional storage charges.

The defendant further contended that the plaintiff had caused the defendant further loss and damage by using the wrong customs tariff code for the machinery forwarded and not the correct customs tariff code as stipulated by the customs. As a result of this careless and negligent act by

the plaintiff, the machinery was detained temporarily pending investigations by the customs at Port Kelang. As a consequence of this detention, the defendant had to provide a guarantee for the sum of RM1.5m for the release of the said machinery, pending the decision of the customs. It was the further case of the defendant that as a result of the detention of the goods the work with regard to the assembling of the machinery by the engineers from Italy was delayed for three months. The engineers had to return to Italy and the defendant had to incur further losses. The said engineers had to return to Malaysia to set up the machinery and the additional charges incurred amounted to US$200,000, which also included the sum of US$40,000 paid for the storage charges. The defendant contended that it had sustained loss of profits of RM3.15m for being unable to operate the machinery for three months during which time it could have produced 7.5m bricks. It also claimed interest paid on the loan from the bank for the sum of RM15m obtained for the purchase of the machinery. Since the payment of the purchase price was delayed by three months resulting in interest being incurred which sum for three months amounted to RM363,750, the defendant counterclaimed for this sum. The defendant also claimed a sum of US$150,000 as installation fee paid by the defendant to the supplier in Italy. All in all the defendant counterclaimed as follows:

(1) General damages for negligence.
(2) US$150,000 being the installation fee.
(3) Loss of profits of RM3.15m.
(4) Bank interest of RM363,750.
(5) US$200,000 as additional payment incurred.
(6) Interest and costs.

Findings of the court

I have no hesitation in concluding that although there were two letters both dated the same day containing the agreed terms between the parties, the letter contained in pp 1 and 2 of 2CABD was the final letter containing the agreed terms.

The main terms were, inter alia:

(a) The plaintiff was to undertake the responsibility of transporting a set of machinery from Genoa to Port Kelang by ocean freight.
(b) The plaintiff was to attend to all customs clearance.
(c) The choice of vessel should be by way of 'conference line'.
(d) The plaintiff was to deliver the said machinery to the defendant's site at Sepang.

I find that four consignments of machinery were shipped pursuant to this contract. The first consignment arrived at Port Kelang in early July 1991. The defendant had settled all dues on this account. The second, third and fourth consignments arrived in Port Kelang in late July and in early August

1991. These facts are borne out from the agreed and admitted invoices and debit notes in the 1 and 2CABDs. From the same documents, I find that there was a sum of RM519,751.40 due to the plaintiff as at 29 October 1991. However, credit notes for various sums were given amounting to RM311,221 leaving a sum of RM208,530.40 being the sum claimed by the plaintiff.

From factory to Italian port (Genoa)

The parties by consent included in the CABD the contract documents between the defendant customer and Morando (manufacturer). Relevant clauses of the said agreement read as follows:

> 2.1 The total amount of this Contract is US$4,450,000 (four million four hundred fifty thousand US Dollars), subdivided in:
>
> - machinery, FOB, engineering US$ 4,300,000
> - assembling US$ 150,000
>
> 2.3 This price includes packing and FOB transportation by open top containers.
>
> 6.1 The delivery of machines and equipment is FOB at Italian port by open top containers. The transportation from the Italian port to the site shall be at the CUSTOMER's charge.
>
> 6.3 Equipment and materials forming part of this Contract will be despatched by open top containers and their packing will suit to the transportation to be carried out.

It is clear from these clauses that the goods were to be despatched by open top containers and Free On Board ('FOB'). In FOB contracts, the duty of the seller is to deliver the goods on board ship at his own expense and as soon as that is done, the property and the risk passes to the buyer who then becomes liable for all subsequent charges. Clause 6.1 is explicit. All costs and other incidentals on the transportation from Genoa to the site at Sepang shall be to the account of the defendant. Therefore, it seems apparent to me that pursuant to 2CABD 1 and 2 the plaintiff had agreed to provide a vessel able to carry open top containers and on conference line and to deliver the goods to the site at Sepang. It would seem that Morando had a contractual obligation to transport the machinery in open top containers to the port of Genoa by which time the plaintiff was to have arranged for a conference line vessel suitable for carrying open top containers to Port Kelang. I reject the plaintiff's contention that its duty was only to provide a vessel capable of carrying open top containers. 2CABD 1 confirms the haulage charges sought by the plaintiff to transport the goods to the site at Sepang.

Was there a delay on the part of the plaintiff?

Whilst I agree that 2CABD 1–2 do not state any requirement of time by when the plaintiff ought to have sourced for a vessel on a conference line and capable of carrying open top containers, I find that the parties must have intended that a reasonable time ought to have been taken by the

A plaintiff. Whilst it would have been prudent to have made time as the essence of the contract, unfortunately no evidence was led as to the exact number of days the plaintiff had delayed in forwarding the goods.

Conference line

B The *Marine Encyclopaedic Dictionary* (2nd Ed) gives the following definition to relevant terms:

> Conference Line
>
> Very much in vogue in the past. Shipowners agreed to have a uniform list of freights which were to be kept unchanged by any one company and a special rebate was allowed to their clients after the lapse of one year. *Similar to* Liner Conference, *qv.*
>
> Liner Conference
>
> An association of foreign-going ships of various nationalities running on schedule in the same trade at uniform rates of freight and giving advantages to regular clients. They provide what is called a liner service. Also called 'Conference Lines', *qv.*
>
> Non-Conference Line
>
> A shipping line which operates on a route served by a liner conference but which is not a member of that conference. Also referred to as an independent line or an outsider.

The plaintiff's sole witness, its executive director, stated in evidence that conference line operators are those who maintain certain rate levels; whereas the sole witness of the defendant, a director, testified by distinguishing conference line and non-conference line by the routes they take and that non-conference line vessels have more stopovers particularly in communist countries, thus inviting greater customs checks. He also maintained without corroborative evidence that the charges of a conference line are 60% more than that of the non-conference line. From the evidence, I gather that a conference line vessel uses a fixed rate of charges and makes pre-determined stopovers. Needless to say, it was with this in mind that the defendant had requested for a conference line vessel as they would know the fixed rates and the timetable of its arrival due to its pre-determined stopovers.

I am also satisfied from the evidence that the plaintiff was unable to obtain a conference line vessel. In its quest to locate a conference line vessel, it is obvious that some delay had occasioned and that it was to obviate any further delay that the plaintiff had shipped the goods on a non-conference line. As I said earlier, the defendant has not been able to satisfy me that the delay was wanton. Even if it was not, time has not been made the essence of the contract. In any case, it is my finding that the delay if any was reasonable.

The facsimile dated 10 May 1991

Parties by consent included a facsimile dated 10 May 1991 from the plaintiff to the defendant. It reads as follows:

> This is to confirm your telephone conversation today with our Mr Soo regarding above shipment. We will now ship above on Balt-Orient Line (Russian) Ex Genoa at the rate US$3300 all-in (excluding THC) per 40' OT container. This is due to the unavailability of all conference lines to provide OT equipment as was discussed previously.
>
> We will revert with all shipping details as soon as available. Thank you for your understanding and cooperation and we look forward to offering you our best service.

The defendant on realizing the contents of the document sought to resile on its agreement to include this document in the CABD.

During the case management of this case, I had given explicit directions to both parties to the effect that if any document in the CABD was disputed with regard to its contents or to its authenticity then notice in writing had to be given to the party seeking to include the document, requiring the presence of the maker of the document for cross-examination. I had directed that a copy of that letter be sent to the judge so that on the following case management day I could look into the actual purpose for calling the maker and to make a ruling thereafter. I had also directed that any document unchallenged would be deemed agreed and admitted of its contents. On 15 January 1998 when this case was called up for case management, my record shows as follows:

> 15 January 1998
>
> Parties have also filed CABD.
>
> Parties confirm no objections to any documents.

In the light of this admission, I hold that it is inappropriate for the defendant to now submit that it has no knowledge of this document. In fact, in *Jaafar Shaari & Anor v Tan Lip Eng & Anor* [1997] 3 MLJ 509 the Supreme Court held that where a document is included in an agreed bundle without any qualification, then no question as to its formal proof arises and that its contents may be relied upon to establish a fact in issue.

It is my judgment therefore that not wanting to delay despatching the goods because of its inability to secure a conference line vessel the plaintiff had, with the consent of the defendant, forwarded the goods on a non-conference line vessel.

In any case, there was no damage sustained by the goods for being carried in a non-conference line vessel which was not able to carry open top containers.

Customs declaration

The defendant contends that the plaintiff had failed to take reasonable and appropriate steps to declare the correct customs tariff code to enable the machinery to be cleared by the customs. The defence witness had categorically stated that no tax was paid. So the issue of negligence pleaded against the plaintiff cannot relate to the payment of tax.

The basis for the defence contention that the wrong code was used was that the said goods were detained by the customs. It is in evidence that a 'tip off' led to the detention of the goods. There is no evidence before me that the goods seized by the customs was due to the use of wrong code to declare the same. A letter from the customs dated 23 August 1991 (1CABD 33) states that the goods were seized for further investigation following information received from the public. A subsequent letter from the customs dated 27 July 1992 (1CABD 37) confirmed that no offence was committed and that the customs had ceased its investigations. It is unfortunate that the customs officer who had handled these goods was not called to testify and to explain to the court the reason for the detention of the goods. After all, if the customs could state that no further investigations would be conducted in respect of these goods, surely they would be in a position to explain the reason for the detention of the goods. No doubt there is a letter dated 17 February 1992 (1CABD 34) which states that the codes that were used were wrong. However, it is obvious that this letter dated 17 February 1992 was written by the tariff department of the customs and not the enforcement division of the customs. Further, this letter appears to have been written in response to an enquiry by the defendant with regard to the manner of codifying the goods. There is no nexus between this letter and the seizure of the goods.

Since the claim for RM208,530.40 has been supported by documents, I allow the claim. As for interest, I hold that the plaintiff is entitled to charge interest at 1.5% per mensem pursuant to cl 4 of the Standard Trading Conditions of the Institute of Freight Forwarders Trading Conditions and the General Terms and Conditions. The said clause reads:

> All cheques are to be crossed and made payable to Helu-Zaid Sdn Bhd. Helu-Zaid Sdn Bhd reserves the right to charge interest on overdue account at the rate of 1.5% per mensem or to vary such rate from time to time in our absolute discretion or as we think fit. Any or all expenses including legal fees and disbursements expended in the recovery of monies owing by you shall be fully paid by you and shall be further recovered from you at a further cost.

The counterclaim

If at all there was any possible claim it would have been the loss sustained due to delay. I have however held that the delay was reasonable. In any case, the defendant has produced no evidence to show that it had paid the US$40,000 being the excess charges it claimed to have paid for the storage caused by the delay in finding a conference line vessel. None of the items claimed in the counterclaim has been proved satisfactory.

Having considered all matters, I allow the plaintiff's claim with interest and costs. The counterclaim is dismissed with costs.

Plaintiff's claim allowed. Counterclaim dismissed with costs.

Reported by Lew Chee Seong